A

Public Prosecutor v Siti Nurhidayah

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05(LB)-455–12 OF 2016
TENGKU MAIMUN, YAACOB MD SAM AND RHODZARIAH BUJANG JJCA
11 APRIL 2018

C

Criminal Procedure — Appeal — Appeal against acquittal and discharge — Respondent charged with offence of trafficking in methamphetamine under s 39(1)(a) of the Dangerous Drugs Act 1952 ('the Act') — High Court judge found respondent succeeded in rebutting presumption under s 37(d) of the Act — Whether respondent's defence mere fabrication — Whether respondent innocent carrier — Whether respondent rebutted presumption under s 37(d) of the Act — Dangerous Drugs Act 1952 ss 37(d) & 39(1)(a)

D

The respondent, an Indonesian national, who was on a Cathay Pacific flight from Hong Kong was arrested with the drug which was found concealed under her checked-in brown luggage at its handle part. The discovery was made when the said brown luggage was scanned by a police officer on duty at the airport, PW11.The respondent and the luggage with all its content were then handed over to the investigating officer of the case ('PW13'). Subsequently, the respondent was charged with trafficking in 1204.5g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which was punishable with death. The learned High Court judge found, inter alia, that a prima facie case was proven against the respondent for she was in possession of the drug and was presumed to have knowledge of it by reason of s 37(d) of the Act. The respondent raised the defence of innocent carrier and testified that she brought the bag on the instruction of her friend Tina. Titin Sukmawati ('DW2') who confirmed that her nickname was Tina testified that the respondent was one of many others whom she engaged to deliver clothing, shoes and accessories on behalf of her ex-boyfriend, Andrew and for which Andrew paid her USD100 each time. Tina also vouched for the respondent's innocence, stating that the respondent was not a drug trafficker but only paid to deliver the said goods. At the end of the case, the learned High Court judge found that the respondent was not willfully blind and that she had succeeded in rebutting the presumption under s 37(d) of the Act and had also raised a reasonable doubt on the prosecution case. Consequently, the respondent was discharged and acquitted by the High Court. In the present appeal, the appellant raised four grounds of appeal ie: (a) the learned High Court judge erred in finding the respondent an innocent carrier; (b) the learned High Court judge erred in not considering that the respondent's conduct was inconsistent

E

F

G

H

I

with innocence at the time of arrest; (c) the learned High Court judge erred in not finding that, regardless of Tina's role, the respondent also came under the context of drug trafficking under s 39B(1)(a) of the Act; and (d) based on the above failures, the learned High Court judge had erred in not finding that the respondent's defence had failed to rebut the presumption under s 37(d) of the Act.

Held, dismissing the appeal and affirming the decision of the learned High Court judge:

(1) The salutary fact here was that the person whom the respondent said was responsible for and instrumental in facilitating her travel prior to her arrest came to court to confirm that it was so. This unlike the many other drug trafficking cases where a similar defence had been raised but where such a 'facilitator' remained just a name. Of course, it would be foolhardy for Tina to say that the drug belonged to her but the inference to be deduced from her testimony was that she and her ex-boyfriend Andrew were in this illicit trade (see para 14).

(2) DW2 confirmed that she was the 'Tina' referred to by the respondent in her evidence. There was nothing on the facts of the case and in the judgement of the learned High Court judge that he held the prosecution accountable for not rebutting the *Alcontara* notice. What he said was as far as the said notice was concerned the respondent had been consistent in her statement upon arrest that she was asked by Tina to collect the goods. Since the 'Tina' mentioned by the respondent actually turned up as her witness to corroborate her evidence, it could not be ruled out that her defence was not one of mere fabrication (see para 15).

(3) The evidence of PW6, Roslan bin Hj Abdul Rahim, the operation manager of Cathay Pacific, who said that according to the airline's record, the weight of the checked-in luggage of the respondent was 20kg but yet from PW13's evidence, the weight of the said luggage was only 8.74kg. In view of this discrepancy shown from the prosecution own evidence, the court could not in all fairness say that the respondent was lying when she testified that the content of the luggage was different from the one seen by her in Guangzhou (see para 17).

[Bahasa Malaysia summary

Responden, berwarganegara Indonesia, yang menaiki penerbangan Cathay Pacific dari Hong Kong telah ditangkap kerana dadah yang dijumpai tersembunyi di bawah bagasi berwarna cokelat yang didaftar masuk di bahagian pemegangnya. Penemuan itu telah dibuat apabila bagasai cokelat terseut diimbas oleh pegawai polis yang bertugas di lapangan terbang itu, PW11. Responden dan bagasi itu dengan kesemua kandungannya seterusnya telah diserahkan kepada pegawai penyiasat kes itu ('PW13'). Berikutan itu,

responden telah dituduh mengedar 1204.5g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1052 ('Akta tersebut') yang boleh dihukum mati. Hakim Mahkamah Tinggi yang bijaksana mendapati, antara lain, bahawa kes prima facie telah dibuktikan terhadap responden kerana dia memiliki dadah tersebut dan diandaikan mempunyai pengetahuan tentangnya oleh sebab s 37(d) Akta tersebut. Responden telah menimbulkan pembelaan pembawa yang tidak bersalah dan memberi keterangan bahawa dia telah membawa beg itu atas arahan rakannya Tina. Titin Sukmawati ('DW2') yang mengesahkan bahawa nama samarannya adalah Tina memberi keterangan bahawa responden ialah salah seorang daripada ramai yang lain dia berurusan untuk menghantar pakaian, kasut dan aksesori bagi pihak bekas teman lelakinya, Andrew dan yang mana Andrew membayarnya USD100 untuk setiap kali. Tina juga mengesahkan responden tidak bersalah, dengan menyatakan bahawa responden bukan pengedar dadah tetapi hanya dibayar untuk menghantar barangan terebut. Di akhir kes, hakim Mahkamah Tinggi yang bijaksana mendapati bahawa responden tidaklah sengaja tanpa pengetahuan dan bahawa dia berjaya mematahkan andaian di bawah s 37(d) Akta tersebut dan juga telah menimbulkan kerahuan munasabah ke atas kes pendakwaan. Dalam rayuan ini, perayu telah menimbulkan empat alasan rayuan iaitu: (a) hakim Mahkamah Tinggi yang bjaksana terkhilaf kerana mendapati responden seorang pembawa yang tidak bersalah; (b) hakim Mahkamah Tinggi yang bijaksana terkhilaf kerana tidak mengambil kira kelakuan responden yang tidak konsisten dengan ketidak bersalahnya pada masa tangkapan; (c) hakim Mahkamah Tinggi yang bjaksana terkhilaf kerana tidak mendapati bahawa, tidak mengira peranan Tina, responden juga terjatuh di bawah konteks pengedar dadah di bawah s 39B(1)(a) Akta tersebut; dan (d) berdasarkan kegagalan di atas, hakim Mahkamah Tinggi yang bjaksana terkhilaf kerana tidak mendapati pembelaan responden telah gagal untuk mematahkan andaian di abwah s 37(d) Akta tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim Mahkamah Tinggi yang bjaksana:

(1) Fakta utama di sini adalah bahawa orang yang dikatakan responden adalah bertanggungjawab dan berperanan dalam memudahkan perjalanannya sebelum penangkapannya telah datang ke mahkamah untuk mengesahkan bahawa ia adalah sedemikian. Ini tidak seperti banyak kes pengedaran dadah yang lain di mana pembelaan yang sama telah ditimbulkan tetapi di mana 'pemudah' sedemikian kekal sebagai nama sahaja. Sudah tentu, ianya tidak bijak bagi Tina untuk mengatakan bahawa dadah itu miliknya tetapi kesimpulan yang boleh dibuat daripada keterangannya adalah bahawa dia dan bekas teman lelakinya Andrew melakukan perdagangan haram ini (lihat perenggan 14).

(2) DW2 mengesahkan bahawa dia adalah 'Tina' yang dirujuk oleh

responden dalam keterangannya. Tiada apa-apa atas fakta kes dan dalam penghakiman hakim Mahkamah Tinggi yang bjaksana bahawa beliau memutuskan pendakwaan bertanggunjawab kerana tidak mematahkan notis *Alcontara* itu. Apa yang dikatakannya adalah setakat mana notis tersebut adalah berkaitan responden sentiasa konsisten dalan kenyataannya semasa tangkapan bbahawa dia telah diminta oleh Tina untuk mengutip barangan itu. Oleh kerana 'Tina' yang disebut oleh responden sebenarnya telah muncul sebagai saksinya untuk menyokong keterangannya, ia tidak boleh diputuskan bahawa pembelaannya bukan semata-mata satu pemaksuan (lihat perengan 15).

(3) Keterangan PW6, Roslan bin Hj Abdul Rahim, pengurus operasi Cathay Pacific, yang mengatakan bahawa menurut rekod syarikat penerbangan, berat bagasi yang didaftar masuk responden adalah 20kg namun berdasarkan keterangan PW13, berat bagasi tersebut hanya 8.74kg. Berdasarkan percanggahan ini yang ditunjukkan oleh keterangan pendakwaan, mahkamah tidak boleh demi keadilan mengatakan bahawa responden menipu semasa memberi keterangannya yang kandungan bagasi tersebut adalah berbeza daripada yang dilihat olehnya di Guangzhou (see perenggan 17).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Dal Bahadur Singh v Bijai Bahadur Singh AIR 17 (1930) PC 79, PC (refd)
Jeanette Congcan Opena v PP [2014] MLJU 1919; [2014] 1 LNS 508, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2017] 1 MLRA 499, CA (distd)
PP v Hla Win [1995] 2 SLR 424, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Roslan bin Sabu @ Omar v PP [2006] 5 MLJ 244; [2006] 4 AMR 772, CA (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39(d), 39B(1)(a), First Schedule

Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Choong Kak Sen (Selvi Sandrasegaram with him) (Gooi & Azura) for the respondent.

Rhodzariah Bujang JCA:

BRIEF FACTS OF THE CASE

[1] The respondent, in this appeal filed by the public prosecutor was discharged and acquitted by the High Court of a charge of trafficking in 1204.5g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which is punishable by death. The charge against her in Bahasa Malaysia reads as follows:

> Bahawa kamu pada 6.11.2013 lebih kurang 7.40 petang di ruang ketibaan International Lapangan Terbang Antarabangsa Bayan Lepas, Pulau Pinang, di dalam Daerah Barat Daya di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat 1204.5 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] As can be gleaned from the charge above the respondent, an Indonesian national, who was on a Cathay Pacific flight from Hong Kong was arrested with the drug which was found concealed under her checked in brown luggage (exh P15) at its handle part. The discovery was made when the said brown luggage was scanned by a police officer on duty at the airport, Detective Sargeant Rosita bt Md Zuki ('PW11') who saw a suspicious greenish image from the luggage. After the respondent was asked to unlock the luggage with the key which she obtained from her front short pants' pocket, its content, which were clothes and another grey coloured bag were taken out. The brown luggage was re-scanned and the same image was again seen. The respondent was then brought to the narcotic office at the said airport where a further examination of the luggage revealed a bulge at the same area where the greenish image was seen. When PW11 unzipped its lining, she discovered a plastic package wrapped with aluminium foil and a black cellotape hidden underneath it which upon further examination revealed crystalline substance believed to be methamphetamine inside it. PW11 also testified that when the respondent was ordered to unlock the brown luggage she looked anxious and panicky ('cemas dan gelisah') and when the drug was discovered she exhibited the same reactions. The respondent, said PW11 also looked shocked ('terkejut'). The respondent and the luggage with all its content were then handed over to the

investigating officer of the case, Insp Mohd Lukman bin Abdul Ghani ('PW13'). PW13 subsequently sent the crystalline substance to the chemist for analysis and the chemist, Raduan bin Mail ('PW4') confirmed that it was methamphetamine with a nett weight of 1204.5g methamphetamine is listed as dangerous drugs under the First Schedule of the DDA. The clothings found in the brown luggage were sent to another chemist for DNA analysis and that chemist, Haznan bin Hashim ('PW8') testified that they contained the respondent's DNA.

[3] Based on the aforesaid evidence, the learned High Court judge found a prima facie case against the respondent for she was in possession of the drug and was presumed to have knowledge of it by reason of s 37(d) of the Act. As for the element of trafficking, the learned High Court judge held that since she was carrying the brown luggage with her in the plane from Hong Kong, that was an overt act covered by the definition of trafficking and given the huge quantity of the drug, it was not meant for her own personal consumption.

[4] Only the above salient facts are related in this judgement because the primary focus of the prosecution's appeal was the defence of the respondent which the learned High Court judge found had rebutted the presumption of possession and knowledge under s 37(d) of the Act as well as raising a reasonable doubt on the prosecution's case.

THE DEFENCE

[5] The respondent's defence was simply that she was offered a job by a fellow country woman, known to her as Tina who was introduced by her husband Andi Suhendi ('DW3') to take delivery of goods, which were clothings and accessories, from Guangzhou, China for a fee of 3,000 Rupiah as she was conversant in Mandarin. She accepted the job because at that material time she had been jobless for about a year. Tina, according to the respondent, arranged for her travel documents and her flight to China on 2 November 2013 and gave her these documentations on 1 November 2013. Upon arrival in Hong Kong that night she took a bus to Guangzhou, China and arrived there the following day and stayed in a nearby hotel. She informed Tina of her arrival there and was told by the former that an African man by the name of Destiny will contact her and he did, at around mid-morning. Destiny fetched her from the hotel and she was then brought by Destiny to another hotel where she stayed until 5 November 2013 whilst waiting for the clothes to be delivered. That morning of 5 November 2013 Destiny came with the said brown-coloured luggage. Upon receipt of the same the respondent said she examined its content, at Tina's request and found it to contain clothes, shoes and handbags with price tags still attached to them. Tina was then informed of the result of her examination. The next day she left for Hong Kong with the

ticket given to her by Destiny to go to Penang where Tina would contact her upon her arrival.

[6] On the discovery of the drugs, she denied the negative reaction as testified by PW11 and that she did tell the police that it was on Tina's instruction that she brought the bag which she said was similarly scanned at Hong Kong International Airport and passed the security clearance there.

[7] The respondent's husband (DW3), corroborated her evidence about her meeting with Tina who was introduced to him by a friend called Ilham Firmanshah and who offered his wife the said job. He had sent the respondent to the airport and she had contacted him upon her arrival in China and appraised him of her meeting with Destiny. More importantly, for the defence, Tina (DW2) gave evidence as the defence second witness. She too corroborated the paid assignment as well as the facts leading to the respondent's departure to Guangzhou and that the respondent was one of many others whom she engaged to deliver clothings, shoes and accessories on behalf of her ex-boyfriend, Andrew and for which Andrew paid her USD100 each time. It was Andrew who told her to tell the respondent that Destiny would be picking her up but even so, she did not tell the respondent the existence of Andrew. The respondent also informed Tina that she was told by Destiny to go to Penang and Tina in turn told the respondent to call her once she reached Penang but the respondent never did. Her repeated calls to the respondent all went unanswered, said Tina. It was only a month later that Andrew informed her of the respondent's arrest. Tina also vouched for the respondent's innocence, stating that the respondent was not a drug trafficker but only paid to deliver the goods as stated. For the record, when DW2 gave evidence, her name was recorded as Titin Sukmawati but she confirmed that her nickname was Tina and that she was the Tina referred to by the respondent in her evidence.

FINDINGS OF THE HIGH COURT JUDGE

[8] The learned High Court judge correctly addressed his mind to the duty he had to shoulder at the close of the defence case, citing the Federal Court decision in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773, *Mat v Public Prosecutor* [1963] 1 MLJ 263 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 and that since he raised the presumption of possession and knowledge against her, it must be rebutted on a balance of probability as held in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89. He likewise rightly identified the defence as being one of an innocent carrier — the real traffickers being Tina and Andrew. The directions given in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 as explained in *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773 states as follows:

That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538.

THE TWO EXERCISES

[9] Upon consideration of the evidence and given that Tina came forward to give evidence, it was clear that she was not a product of the respondent's imagination. Tina came forward to testify at 'the risk of literally putting her neck on the line' and exposing herself to prosecution and the death penalty, said His Lordship. He borrowed the words of Lord Buckmaster in *Dal Bahadur Singh v Bijai Bahadur Singh* AIR 17 (1930) PC 79, viz 'in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true'. and came to a finding that Tina's evidence was not a mere invention or fabrication merely for the purpose of assisting the respondent — this considering the enormity of the risk undertaken by her. He also found her evidence credible because dispite rigorous cross-examination, her testimony emerged largely unscathed. Furthermore, the respondent's defence corresponds in material particulars with that stated in Tina's testimony.

[10] Next the learned High Court judge dealt at some length with the requirements of the *Alcontara* notice as laid down in the case of the same name, *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 and found, as admitted by the PW13 that the respondent had divulged the material parts of her defence at the earliest opportunity so it cannot be dismissed as an afterthought. Although she never mentioned Andrew's involvement when giving evidence the learned High Court judge held this was not fatal to the defence because from Tina's evidence, the respondent was not aware of Andrew's existence.

[11] Since the defence of an innocent carrier comes with it the concept of wilful blindness as held in the Singaporean case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424 and accepted as also the law by our Malaysian case (see for example, the cases cited by the learned High Court judge at para 95 of the judgment, viz, *Roslan bin Sabu @ Omar v Public Prosecutor* [2006] 5 MLJ 244; [2006] 4 AMR 772 and *Jeanette Congcan Opena v Public Prosecutor* [2014] MLJU 1919; [2014] 1 LNS 508), the learned High Court judge proceeded to deal with that issue. His Lordship decided that the said concept

must be assessed on an objective standard, that is whether a reasonable person similiarly circumstanced would make inquiries as to the content of the bag or package that he or she was asked to carry on behalf of another.

[12] Referring to the evidence from PW11 who agreed that the naked eye could not see anything suspicious of the brown luggage for the drug was carefully and professionally concealed so as not to arouse suspicion, that it was scanned and passed the security inspection in Hong Kong Airport and that the respondent had taken all reasonable and necessary steps to ascertain the bag's content, the learned High Court judge found that the respondent was not wilfully blind. She has succeeded in rebutting the presumption under s 37(d) of the Act and has raised a reasonable doubt on the prosecution case.

GRIEVANCE OF THE PUBLIC PROSECUTOR

[13] Against the above findings, the public prosecutor had submitted four grounds in their memorandum of appeal which we have paraphrased as follows:

(a) the learned High Court judge erred in finding the respondent an innocent carrier;

(b) the learned High Court judge erred in not considering that the respondent's conduct was inconsistent with innocence at the time of arrest;

(c) the learned High Court judge erred in not finding that regardless of Tina's role, that of respondent also came under the context of drug trafficking under s 39B(1)(a) of the Act; and

(d) based on the above failures, the learned High Court judge had erred in not finding that the respondent's defence has failed to rebut the presumption under s 39(d) of the Act.

INNOCENT CARRIER

[14] The learned deputy public prosecutor submitted that Tina was not the real trafficker because she was not the one who handed the brown luggage containing the drug to the respondent and she has denied knowledge about the drugs in her cross-examination and was merely assisting Andrew to look for carriers for the goods. All these evidence of hers, submitted the learned deputy public prosecutor further, does not negate the fact that the respondent had prior knowledge of the drugs in the brown luggage. Despite the aforesaid denials of Tina, we are unable, with respect, to agree with the contention above for the salutary fact here is that the person whom the respondent said was responsible for and instrumental in facilitating her travel prior to her arrest actually came to court to confirm that it was so. This unlike the many other

drug trafficking cases where a similar defence had been raised but where such a 'facilitator' remained just a name. Of course it would be foolhardy for Tina to say that the drug belonged to her but the inference to be deduced from her testimony is that she and her ex-boyfriend Andrew were in this illicit trade.

[15] As to whether DW2 and Tina are one and the same person, it is true what the learned deputy public prosecutor raised in her submission that the respondent never gave Tina's full name to PW13 but only did so when she took the stand but that does not mean that DW2 and Tina are not the one and same person. As said earlier, when DW2 gave evidence she confirmed that she was the Tina referred to by the respondent in her evidence. There is nothing on the facts of the case and in the judgement of the learned High Court judge that he held the prosecution accountable for not rebutting the *Alcontara* notice. What he said was as far as the said notice was concerned the respondent had been consistent in her statement upon arrest that she was asked by Tina to collect the goods. And since the Tina mentioned by the respondent as the person who sent her to collect the goods which were later delivered in that brown luggage by that African man Destiny, actually turned up as her witness to corroborate her evidence, it could not be ruled out that her defence was not one of mere fabrication.

[16] The learned deputy public prosecutor pointed out in her submission that PW11 could see the bulge when she examined the brown luggage but it must be pointed out that this was after all its content were taken out and after she was alerted by the suspicious green image on the monitor when it was scanned. The recent Federal Court decision of *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2017] 1 MLRA 499 where the Federal Court overturned the lower court's finding that the respondent, also an Indonesian woman with a similar defence, was an innocent carrier is distinguishable on the facts. This we say because Herlina, although similarly engaged, by a friend Vivian, to pick up golden thread sarees from Laos to Indonesia made a stopover in Malaysia before flying to Laos and it was *here*, that is Malaysia, that the drug in two boxes were given to her by a friend of Vivian named Jo. The Federal Court held that her story was improbable because if her paid assignment was to Laos why the need to stopover in Malaysia and why did she agree to carry the boxes for a total stranger, Jo. Again, the difference in this appeal before us, we stressed is that Tina came to give evidence and as pointed out by the respondent's counsel in his submission before us, the Federal Court in *Herlina*'s case did acknowledge that,

> Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the *trial judge from all the facts and circumstances of the particular case,* giving due weight, where necessary, to the *credibility of the witnesses* (see *Public Prosecutor v Tan Kok An* [1996] 1 MLJ 89; [1995] 4 MLRH 256). (Emphasis added.)

[17] We do however acknowledge the truth of the learned deputy public prosecutor's submission that the brown luggage does not contain new clothes, handbags and shoes as stated by the respondent in her defence, just nine pieces of garments as shown in the photographs at pp 28–32 of the appeal record Vol 3. The respondent in her cross-examination, and when shown the said photographs did say that the content of the brown luggage was not the same as seen by her in Guangzhou. However, the respondent's counsel had in his oral submission in reply referred us to the evidence of PW6, Roslan bin Hj Abdul Rahim, the Operation Manager of Cathay Pacific, who said that according to the airline's record, the weight of the checked-in luggage of the respondent was 20kg (see his evidence at pp 51 and 57 of the appeal record Vol 2) but yet from PW13's evidence, the weight of the said luggage was only 8.74kg (see p 191 of appeal record Vol 2). In view of this discrepancy shown from the prosecution own evidence, we cannot in all fairness say that the respondent was lying when she testified that the content of the luggage was different from the one seen by her in Guangzhou. The probability that the content of the luggage was tampered with was even put to PW13 during cross-examination (see p 174 of the appeal record Vol 2). Granted that the learned High Court judge did not mention this issue of tampering of the content of the brown luggage in his grounds of judgement but given that it was raised before us in submission we were fully entitled to resolve it based on the evidence adduced before the learned High Court judge.

CONCLUSION

[18] Premised on the aforesaid considerations, the appeal was dismissed and the decision of the learned High Court judge was affirmed.

Appeal dismissed; decision of learned High Court judge affirmed.

Reported by Dzulqarnain Ab Fatar